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Nos. 90-757 and 90-1032

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the courts below: Marie Bookman; Walter Willard; Marc Morial; Henry Dillon III; the Louisiana Voter Registration/Education Crusade; Edwin Edwards, in his capacity as Governor of the State of Louisiana; James H. Brown and W. Fox McKeithen, in their capacities as Secretaries of State of the State of Louisiana; Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana; Pascal F. Calogero, Jr.; and Walter F. Marcus, Jr.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (90-757 Pet. App. 1a-3a) [1] is reported at 917 F.2d 187. The opinion of the district court (excerpted at Pet. App. 4a-

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[1] The petition appendix in No. 90-757 contains the materials required by this Court's Rule 14.1(k). Unless otherwise noted, we will hereafter use the term "Pet. App." to refer to the petition appendix in No. 90-757.

64a) is unreported. An earlier opinion of the court of appeals (J.A. 26-44) is reported at 839 F.2d 1056. An earlier opinion of the district court (J.A. 12-25) on the merits is reported at 659 F. Supp. 183. An earlier opinion of the district court on a stay motion is reported at 690 F. Supp. 1524. Earlier opinions of the court of appeals on a stay motion are reported at 850 F.2d 1051 and 853 F.2d 1186.

The panel opinion of the court of appeals in the related case of *League of United Latin American Citizens Council No. 4434* v. *Clements* is reported at 902 F.2d 293. The en banc decision of the court of appeals in that case is reported at 914 F.2d 620 and is reprinted in the appendix to the petition (at 1a-182a) in No. 90-813.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1990. The petition in No. 90-757 was filed on November 14, 1990. The petition in No. 90-1032 was filed on December 28, 1990. This Court granted the petitions and consolidated them on January 18, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee

> set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

1. Louisiana elects its seven justices to the state supreme court from six judicial districts for ten-year terms. The First District, which includes Orleans, St. Bernard, Plaquemines, and Jefferson Parishes, elects two justices at-large. Each of the other five districts elects one justice. La. Const. Art. 5, § 4; La. Rev. Stat. Ann. § 13:101 (West 1983). See Pet. App. 7a-8a; J.A. 46-47.

In September 1986, plaintiffs Ronald Chisom *et al.*, black registered voters in Orleans Parish, Louisiana, filed a complaint, alleging that the system for electing two state supreme court justices from the First Judicial District in at-large elections had the purpose and the effect of diluting black voting strength, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, the Equal Protection Clause of

the Fourteenth Amendment, and the Fifteenth Amendment. J.A. 5-11. The plaintiffs alleged that the elections in the First District, in which a majority of the population and registered voters are white, had been marked by, inter alia, racial bloc voting; that few blacks had been elected to public offices in the district; that there was no justifiable basis for singling out the First District for multi-member elections; and that the First District could be divided into two districts, each of which, like the remaining judical districts, would elect one justice. J.A. 7-9. The plaintiffs argued that an appropriate division along parish lines would produce one district—Orleans Parish—in which a majority of the population and registered voters would be black. J.A. 8, 10; Pet. App. 4a-6a.

2. The district court dismissed the complaint, holding that Section 2 of the Voting Rights Act of 1965 does not apply to judicial elections. *Chisom* v. *Edwards*, 659 F. Supp. 183 (E.D. La. 1987) (*reprinted at* J.A. 12-25). The court concluded that Section 2, by its terms, is violated only when minority voters prove that they lack an equal opportunity "to elect representatives of their choice." Section 2 therefore does not apply to judicial elections, the court held, since judges are not "representatives." 659 F. Supp. at 185-187.[2]

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[2] The district court also dismissed the plaintiffs' claims under the Fourteenth and Fifteenth Amendments, on the ground that the plaintiffs had not adequately alleged intent to discriminate. 659 F. Supp. at 187-189. The court of appeals reversed and reinstated those claims, *Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988), but after trial the district court held that the plaintiffs had not proved intentional discrimination, Pet. App. 63a-64a. Those claims are no longer at issue.

3. Plaintiffs appealed and the court of appeals reversed, holding that Section 2 applies to judicial elections. *Chisom* v. *Edwards*, 839 F.2d 1056 (5th Cir. 1988) (*Chisom I*) (*reprinted at* J.A. 26-44). The court stated that the original language of Section 2, enacted in 1965, prohibited discrimination in any "voting qualification or prerequisite to voting or standard, practice, or procedure," and that Section 14 (c)(1) of the Act, 42 U.S.C. 1973*l*(c)(1), defined the term "voting" as applying to "any primary, special, or general election * * * with respect to candidates for public or party office and propositions for which votes are received in an election," demonstrating Congress's intent to prohibit a broad range of discriminatory electoral practices. 839 F.2d at 1059-1060. Because judges are "candidates for public or party office," the court held that the 1982 amendments to Section 2, which added the term "representatives" on which the district court relied, still applied to judicial elections. The 1982 amendments, the court concluded, did not limit the Act's scope, but instead enacted the "results" test that this Court had rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). 839 F.2d at 1060-1061. The court of appeals rejected the district court's reliance on the line of "one person, one vote" cases holding that judges are not representatives, on the ground that cases involving racial discrimination are not governed by the same considerations as cases involving nonracial reapportionment. *Id.* at 1060-1061.

The court also found relevant some secondary sources of congressional intent. For example, the court saw some indication in the legislative history of the 1982 Voting Rights Act amendments that Congress understood Section 2 to apply to judicial elec-

tions. 839 F.2d at 1061-1063. The court also relied on the holding in *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), summarily aff'd, 477 U.S. 901 (1986), that Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which requires preclearance of changes in electoral procedures in some States and which has relevant coverage language nearly identical to that of Section 2, applies to judicial elections. 839 F.2d at 1063-1064. Finally, the court noted that the Attorney General has consistently interpreted the Voting Rights Act as covering judicial elections. *Id.* at 1064.

The defendants sought review in this Court, which denied certiorari *sub nom. Roemer* v. *Chisom*, 488 U.S. 955 (1988).[3]

4. After trial,[4] the district court held that the plaintiffs had failed to prove a violation of Section 2 under the standard set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Specifically, the court held that plaintiffs had failed to prove that black voters are geographically compact or politically cohesive, or that there was significant racial bloc voting. Pet. App. 16a-62a.

5. The plaintiffs and the United States appealed, claiming that the district court's findings and conclusions were erroneous. Before the appeal was decided, however, the Fifth Circuit, sitting en banc, decided *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F.2d 620 (1990) (*LULAC*) (*reprinted at* 90-813 Pet. App. 1a-182a). The plaintiffs in *LULAC* alleged that the at-large election of trial judges in nine Texas counties diluted the ability of minority populations in each county to elect candidates of their choice, in violation of Section 2. In *LULAC*, the en banc Fifth Circuit, by a 7-6 vote, held that the Section 2 vote dilution test does not apply to the election of judges, and expressly overruled *Chisom I*.

The court held that while Section 2 generally applies to judicial elections, the vote dilution test of Section 2(b) does not, since judges are not "representatives" under Section 2(b) or as a general matter. *LULAC*, 914 F.2d at 625-627. As support for its interpretation, the court pointed out that the concept of minority vote dilution was modeled on the vote dilution standards developed in "one-man, one-vote" cases, *id.* at 627-628, and that by 1982 numerous federal court decisions, including a decision by this Court—*Wells* v. *Edwards*, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972) (three-judge court)—had ruled that "the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections," 914 F.2d at 626; *id.* at 626 n.9 (collecting cases). Applying the canon of construction that Congress is presumed to be aware of and endorse "the uniform construction" placed on a term, the majority determined that Congress used the term "representatives" in order to apply the new results test of Section 2 to elections for representative, politi-

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[3] The district court thereafter enjoined an election scheduled for the autumn of 1988, *Chisom* v. *Edwards*, 690 F. Supp. 1524 (E.D. La. 1988), but the court of appeals stayed the injunction, *Chisom* v. *Roemer*, 850 F.2d 1051 (5th Cir. 1988), and ultimately set it aside, *Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988).

[4] The United States intervened in the district court after the remand for trial. J.A. 2; see *id.* at 45-50. The United States had participated at earlier stages of the case as an amicus curiae.

cal offices but not to vote dilution claims in judicial contests. 914 F.2d at 628. The court found unpersuasive the fact that the definitional provision of the Act, 42 U.S.C. 1973*l*(c)(1), defined "voting" by reference to "candidates for public or party office," because the term "representatives" in Section 2 was more specific. *LULAC*, 914 F.2d at 629. Because Section 5 of the Voting Rights Act does not use the word "representatives," the majority also found irrelevant the fact that Section 5 applies to judicial elections. *Ibid.*

Six members of the en banc court, in three separate opinions, concluded that the dilution test of Section 2 applies to judicial elections. Judge Higginbotham, joined by three other judges, concluded that the term "representatives" encompasses elected judges. *LULAC*, 914 F.2d at 635-645. He nevertheless concluded that the at-large election of trial judges in Texas does not violate Section 2 since each trial judge, like each governor, occupies a so-called "single-person office" whose electorate cannot be further subdivided. In such instances, he said, electing all trial judges on an at-large basis does not dilute minority voting strength. 914 F.2d at 645-651. Concurring specially, Chief Judge Clark said that he agreed with Judge Higginbotham, adding that vote dilution analysis might be appropriate when a State elects its judges from single-member districts. *Id.* at 631-634. Judge Johnson dissented. In his view, the Section 2(b) vote dilution test applies to judicial elections, and the "single-person office" exception did not apply in the *LULAC* setting, because at the trial court level there were multiple office holders. 914 F.2d at 651-671.

6. Thereafter, the court of appeals issued a per curiam opinion in this case. Relying on *LULAC*, the

court remanded this case to the district court with directions to dismiss the Voting Rights Act claims for failure to state a claim upon which relief could be granted. Pet. App. 1a-3a.

SUMMARY OF ARGUMENT

A. The original version of Section 2 of the Voting Rights Act of 1965 covered the election of judges. Section 2 applied to any "voting qualification or prerequisite to voting or standard, practice, or procedure," while Section 14(c)(1) defined "vote" and "voting" to "include all action necessary to make a vote effective in any primary, special, or general election * * * with respect to candidates for public or party office." Together, these provisions applied to the election of any state or local officer, whether in the legislative, executive, or judicial branch. A candidate who stands in a primary or the general election for a position on a state trial or appellate court easily fits within that definition. The legislative history of the 1965 Act did not create an exception for judicial elections, and the principle that Congress intended "to give the Act the broadest possible scope," *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969), eliminates any lingering doubt.

B. The amended version of Section 2 enacted in 1982 also applies to judicial elections. Congress did not amend that law to shorten its reach; Congress revised Section 2 in order to enact the "results" test rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Congress accomplished that result by dividing Section 2 into two parts, adding to subsection (a) the term "results" and defining the new results test in subsection (b). But Congress did not alter the text of the original Section 2 defining the reach of that law ("[n]o voting qualification", etc.). Thus,

amended Section 2, like its predecessor, covers every election for public office.

The Fifth Circuit erred in *LULAC* in ruling that the term "representatives" in Section 2(b) exempts the election of judges from the results test of the statute. The legislative history of the 1982 amendments does not indicate that Congress used that term in order to limit the scope of Section 2. Congress used that term interchangeably with other terms such as "candidates" and "elected officials" to refer to elected officials, negating the suggestion that "representatives" was adopted as a term of art to describe a limited range of elected officials. The functions and responsibilities of judges obviously differ from those of other officials, but a State's decision to elect its bench indicates that the State wants to hold its judges accountable to the electorate. The Fifth Circuit also erred in relying on "one person, one vote" cases to determine that Congress excluded judges from the Section 2 results test. Congress did not rely on those decisions; instead, Congress looked to racial vote dilution cases and the principles they developed, which would apply to any elected official.

C. The thrust of the reasoning in *LULAC* and respondents' argument is that courts occupy a unique position in our government, that Congress surely was aware of and intended to protect that role when it amended Section 2 in 1982, and that Section 2 thus should not be read to treat judges in the same manner as legislators and executive officials. Those factors, however, are relevant to how the Section 2 results test applies to judicial elections, not to whether such elections are subject to the Act at all. In addition, such justifications must be examined in context. Louisiana has chosen to elect supreme court justices on a district-by-district basis, and therefore cannot

rely on the same justifications that could be invoked in the case of uniform at-large elections.

ARGUMENT

THE RESULTS TEST OF SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 APPLIES TO THE ELECTION OF STATE JUDGES

A. The Original Version Of Section 2, Enacted As Part Of The Voting Rights Act Of 1965, Applied To The Election Of State Court Judges

Section 1 of the Fifteenth Amendment held out the promise that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Although the text of that Amendment spoke in clear, broad terms, this Court's decisions showed that, in meeting the hard realities of the Reconstruction era and beyond, its reach exceeded its grasp. The Amendment invalidated pre-Reconstruction laws denying newly freed slaves the right to vote, but did not effectively grant blacks the franchise. Blacks were often robbed of their opportunity to participate in the political process because of a widely shared and deeply entrenched policy of excluding blacks from the ballot, the polling booth, and the party process. These efforts to deny blacks the franchise took various forms, such as outright exclusion from a polling booth,[5] physical intimidation and violence,[6]

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[5] See *United States* v. *Reese*, 92 U.S. 214 (1876).

[6] See *Ex parte Yarborough*, 110 U.S. 651 (1884).

the "grandfather clause,"[7] the "white primary,"[8] improper procedural hurdles,[9] racial gerrymandering,[10] improper challenges,[11] the discriminatory use of literacy tests,[12] and the poll tax.[13] History demonstrated that the policy of discrimination in voting was far too resilient for the Fifteenth Amendment alone to excise.

Finally, after "nearly a century of systematic resistance to the Fifteenth Amendment," Congress adopted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as a comprehensive means of enforcing the Fifteenth Amendment "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315, 328 (1966). Mindful of the protean nature of past discrimination, *id.* at 308-315; *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 118-121 (1978), Congress aimed the statute "at the subtle, as well as the ob-

[7] See *Guinn* v. *United States*, 238 U.S. 347 (1915); *Myers* v. *Anderson*, 238 U.S. 368 (1915).

[8] See *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

[9] See *Lane* v. *Wilson*, 307 U.S. 268 (1939).

[10] See *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[11] See *United States* v. *Thomas*, 362 U.S. 58 (1960), summarily aff'g *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La. 1960).

[12] See *Schnell* v. *Davis*, 336 U.S. 933 (1949); *Alabama* v. *United States*, 371 U.S. 37 (1962), summarily aff'g 304 F.2d 583 (5th Cir. 1962); *Louisiana* v. *United States*, 380 U.S. 145 (1965).

[13] See *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1963).

vious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969).

To achieve that end, Congress used broad terms to define the reach of the Act. For instance, Section 2, the basic component of that law, broadly prohibited discrimination in voting, stating that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973 (1976). Section 14(c)(1) defined the crucial words "vote" or "voting" in equally broad terms, providing that they would "include all action necessary to make a vote effective in any primary, special, or general election * * * with respect to candidates for public or party office." 42 U.S.C. 1973*l*(c)(1) (1976). Taken together, the plain language of Section 14(c)(1) applies the prohibitions of Section 2 to all elections regardless of the particular function performed by the specific office at issue. As this Court stated in *South Carolina* v. *Katzenbach*, 383 U.S. at 316, "Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds." See also *Allen* v. *State Bd. of Elections*, 393 U.S. at 566-567.

The text of the Voting Rights Act of 1965 therefore clearly applies to the election of state judges at the appellate or trial levels, whether at-large or on a district-by-district basis. When a State chooses to elect judges, candidates in those elections easily fit within the statutory definition of "voting," because those persons are "candidates for public * * * office."

And while the text of the Act is clear, the principle that Congress intended "to give the Act the broadest possible scope," *Allen* v. *State Bd. of Elections*, 393 U.S. at 567, is sufficient to eliminate any doubt that might linger.

For its part, however, a deeply divided Fifth Circuit in *LULAC* concluded that the definition of the statutory term "voting" in Section 14 carried "little force" since it was "a general term buried in a definitional section far from Section 2." *LULAC*, 914 F.2d at 629. That conclusion, however, is puzzling. The term "voting" is critical to a proper understanding of the difference between the electoral process, which the Voting Rights Act reaches, and the appointive process, whether for legislative, executive, or judicial offices, to which the statute does not apply. To state the obvious, Section 2 does not apply to the method of selecting a sergeant-at-arms for the state legislature or the counsel who assist a legislative committee, even though both processes involve the selection of a legislative officeholder. The reason for non-coverage in those instances is simply that in neither case does the public vote for a candidate. By the same token, Section 2 does not reach the method of appointing state court judges, but it does apply whenever judges stand as "candidates for public * * * office." 42 U.S.C. 1973*l*(c)(1). And a definitional section—wherever "buried" in a statute—seems to us a rather logical place to look to determine the scope of the statute's reach.

Two decisions by this Court construing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, support our conclusion. The Court has twice held that Section 5, which requires certain jurisdictions to submit changes in their voting procedures to the District of Columbia district court or the Attorney General for

preclearance, applies to the election of state judges. *Martin* v. *Haith*, 477 U.S. 901 (1986), summarily aff'g 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court); *Brooks* v. *Georgia State Bd. of Elections*, 111 S. Ct. 288 (1990), summarily aff'g No. C.A. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court).[14] Congress used the same operative language (*i.e.*, "voting qualification", etc.) in defining the scope of Sections 2 and 5 of the Act. Inasmuch as Congress is presumed to give terms the same meaning throughout a statute, see *Sullivan* v.

[14] This Court's summary affirmances are entitled to precedential value only as to the questions that were presented and necessarily decided in such cases. See, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 784 n.5 (1983); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). In both *Haith* and *Brooks* the question whether Section 5 covered changes with respect to judicial elections was presented to and necessarily decided by this Court.

In *Haith*, the defendants argued that the election of judges is not subject to Section 5 of the Voting Rights Act because judges are not subject to the "one-man, one-vote" principle and because they have functions different from those of legislators. The district court rejected that argument. 618 F. Supp. at 412. The defendants appealed the district court's judgment to this Court, and presented the question whether Section 5 applies to judicial elections. Jurisdictional Statement i (Question I), 4-15, *Martin* v. *Haith*, No. 85-1066. This Court summarily affirmed. *Martin* v. *Haith*, 477 U.S. 901 (1986). Similarly, the three-judge district court in *Brooks* held that Section 5 applies to the election of judges. The defendants appealed that judgment to this Court, and presented the question whether Section 5 applies to judicial elections. Jurisdictional Statement i (Question III), 19-21, *Georgia State Bd. of Elections* v. *Brooks*, No. 90-332. This Court again summarily affirmed. *Georgia State Bd. of Elections* v. *Brooks*, 111 S. Ct. 288 (1990). Accordingly, this Court's summary affirmances in *Haith* and *Brooks* necessarily held that Section 5 applies to the election of state court judges.

Stroop, 110 S. Ct. 2499, 2504 (1990); *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983), this Court's holdings in *Haith* and *Brooks* support the proposition that Section 2 applies to judicial elections.[15] Moreover, because Section 5 applies to the election of judges, excluding such elections from Section 2 leads, as Judge Higginbotham noted in *LULAC*, 914 F.2d at 645 (concurring in the judgment), to the "incongruous result" that a State covered by Section 5 cannot implement a new discriminatory voting procedure with respect to judicial elections, but such a discriminatory system already in effect cannot be challenged under the very statute that Congress intended to be used as the vehicle to redress such illegalities. The anomaly created by the Fifth Circuit's grudging interpretation of Section 2 suggests that Congress did not intend the law to have such curiously shifting coverage.

There is no contrary indication in the legislative history of the 1965 Act. See S. Rep. No. 162, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965); *Message from the President of the United States Relative to the Right to Vote*, H.R. Doc. No. 117, 89th Cong., 1st Sess. (1965). That should come as no surprise, in view of the broad language that Congress used to define the scope of that law. See *Allen* v. *State Bd. of Elections*, 393

[15] The district court in *Haith* expressly rejected the same type of argument that the Fifth Circuit found persuasive in this case and in *LULAC*: namely, that the election of judges is exempt from Section 5 because the "one-person, one-vote" standard applied in reapportionment cases does not apply to the election of judges. The court reasoned that "[a]s can be seen" from its text, "the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413.

U.S. at 566. In sum, the original version of Section 2 clearly applied to judicial elections. *LULAC*, 914 F.2d at 637 (Higginbotham, J., concurring in the judgment).

B. The Revised Version Of Section 2, Added By The Voting Rights Act Amendments Of 1982, Also Applies To The Election Of State Judges

The Fifth Circuit did not dispute, either in this case or in *LULAC*, that the original version of Section 2 applied to the election of judges. Instead, the Fifth Circuit held in *LULAC* that Congress effectively narrowed the scope of Section 2 in the Voting Rights Act Amendments of 1982. As we explain below, that conclusion is badly off the mark. Congress did not intend to exempt judicial elections from Section 2, nor did it mistakenly pass a law that had such an unintended effect. For the reasons stated below, amended Section 2, like the original version, reaches the election of state judges.

1. *Congress added the results test to Section 2 in order to modify the elements of a violation of that law without also restricting its scope*

The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, were principally designed to reverse this Court's 1980 decision in *City of Mobile* v. *Bolden*. *Bolden* involved a vote dilution challenge brought under the original version of Section 2 against the at-large system for electing the city commission of Mobile, Alabama. The lower courts held that the at-large system was unlawful under the vote dilution standard adopted in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School*

Bd. v. *Marshall*, 424 U.S. 636 (1976), which did not require proof of intentional discrimination. This Court reversed without a majority opinion, but a plurality reasoned that the Act simply restated the constitutional standard and therefore required proof of discriminatory intent, which the plaintiffs had not proved in that case. 446 U.S. at 60-74.

Congress responded to *Bolden* by modifying Section 2 in order to enact the "results" test that this Court had rejected. S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) [hereinafter Senate Report]; *Thornburg* v. *Gingles*, 478 U.S. 30, 35, 44 n.8 (1986). Congress accomplished that goal by dividing Section 2 into two parts; by adding to subsection (a) the phrase "in a manner which results in a denial or abridgement of" the right to vote, as provided in the results test of subsection (b); and by defining that test in subsection (b) in a manner that "codif[ied] the leading pre-*Bolden* vote dilution case," *White* v. *Regester*, 412 U.S. 755 (1973). Senate Report 2.[16]

[16] Congress also relied on a series of decisions by the courts of appeals, principally the Fifth Circuit, analyzing electoral plans under the dilution inquiry developed by this Court in *White* and the Fifth Circuit in *Zimmer* v. *McKeithen*. Senate Report 23. The Senate Report referred to a list of 23 court of appeals' decisions that applied dilution principles to multi-member or single-member districting plans. The Report stated that Congress's intent was "to incorporate that [*White*] precedent and extensive case law which developed around it, into the application of Section 2." Senate Report 32; see also, *e.g.*, Senate Report 23, 29-30, 32-33; 1 *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1216-1226 (1982) [hereinafter Senate Hearings].

At the same time, Congress did not alter that portion of the text of Section 2 defining the reach of that statute (*i.e.*, the language referring broadly to "[n]o voting qualification", etc.).[17] Congress also left alone the definition of "voting" in Section 14(c)(1), which applies the Act to every election for "candidates for public * * * office." Thus, amended Section 2(a), like its predecessor (the 1965 version of the Act), encompasses elections of every stripe; there is no categorical exclusion of judicial elections.

Nothing in the legislative history of the 1982 amendments indicates that Congress intended to cut back on the reach of Section 2. The Senate Judiciary Committee Report accompanying the Senate's version of Section 2 stated that the Committee sought to amend that section to make clear that proof of intentional discrimination is not necessary to establish a Section 2 violation, and to enact the "results" test this Court had rejected in *Bolden*. Senate Report 2. The Committee concluded that "*White*, and the decisions following it made no finding and required no proof as to the motivation or purpose behind the practice or structure in question. * * * [T]he specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." Senate Report 28. Congress revised Section 2 in order to alter the proof necessary to establish a violation of

[17] After the amendments, Section 2(a) reads as follows (new language emphasized):

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement of* the right of any citizen of the United States to vote on account of race or color * * * *as provided in subsection (b) of this section.*

that law, not to limit its scope. Nothing in the legislative history states that amended Section 2 does not apply to the election of state judges, or that the results test of Section 2(b) does not apply to such elections. The text of amended Section 2 is therefore controlling. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies*, 111 S. Ct. 615, 623 (1991); *Sullivan* v. *Stroop*, 110 S. Ct. at 2502-2503.

In sum, neither the text of Section 2 nor its purpose or history shows that Congress deliberately exempted judicial elections from the results test of that law. If, as the majority below surmised, Congress intended in 1982 to restrict the scope of Section 2 so that it no longer covered judicial elections, it is reasonable to suppose that Congress would have said so. It did not say so, because it harbored no such intent.

2. *Congress used the term "representatives" in Section 2 in order to refer to any type of elected official, not to exclude judges from the scope of that law*

In determining that Section 2's results test does not apply to judicial elections, the Fifth Circuit in *LULAC* relied heavily on Congress's use of the term "representatives" in subsection (b). The *LULAC* majority reasoned that the term "representatives" necessarily excludes elected judges, and that when it amended the Voting Rights Act in 1982, Congress knew about and relied on a line of decisions holding that the "one-person, one-vote" principle stemming from *Reynolds* v. *Sims*, 377 U.S. 533 (1964), does not apply to judicial elections because judges are not "representatives." *LULAC*, 914 F.2d at 624-629.[18]

[18] Several decisions by this Court and others have ruled that the "one person, one vote" standard of apportionment does not apply to the election of judges. See *Sagan* v. *Pennsylvania*, 542 F. Supp. 880 (W.D. Pa. 1982), appeal dismissed, 714 F.2d 124 (3d Cir. 1983) (Table); *Gilday* v. *Board of Elections*, 472 F.2d 214 (6th Cir. 1972); *Concerned Citizens* v. *Pine Creek Conservancy Dist.*, 473 F. Supp. 334 (S.D. Ohio 1977); *Buchanan* v. *Gilligan*, 349 F. Supp. 569 (N.D. Ohio 1972); *Wells* v. *Edwards*, 347 F. Supp. 543 (M.D. La. 1972) (three-judge court), summarily aff'd, 409 U.S. 1095 (1973); *Holshouser* v. *Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), summarily aff'd, 409 U.S. 807 (1972); *Sullivan* v. *Alabama State Bar*, 295 F. Supp. 1216 (M.D. Ala.), aff'd mem., 394 U.S. 812 (1969); *Kail* v. *Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967); *Romiti* v. *Kerner*, 256 F. Supp. 35 (N.D. Ill. 1966); *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), and vacated, 400 F.2d 882 (6th Cir.), cert. denied, 393 U.S. 839 (1968); *Stokes* v. *Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964). See generally *LULAC*, 914 F.2d at 626 n.3 (collecting cases).

Respondents make the same argument. See 90-757 Br. in Opp. 8-29. Although the argument has superficial appeal, it is ultimately mistaken.

a. Congress patterned the results test it enacted in 1982 after a passage in this Court's decision in *White* v. *Regester*, 412 U.S. 755 (1973), which involved a constitutional challenge to the election of state legislators. The relevant passage focused on the question whether minority voters "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766. Congress incorporated that principle into the Act, but substituted the word "representatives" for "legislators." Congress did not define "representatives," and thus the term should be given its "ordinary meaning." *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990); *Russello* v. *United States*, 464 U.S. 16, 21 (1983); *Richards*

v. *United States*, 369 U.S. 1, 9 (1962). But "representative" has more than one ordinary meaning, see *Webster's Third New International Dictionary* 1926-1927 (1986) (*Webster's*), so the question becomes what degree of generality Congress had in mind for this term when it adopted Section 2.

For example, "representative" can mean "a member of the House of Representatives of the U.S. Congress" or "a member of a house of representatives in a state legislature." *Webster's* 1926. See U.S. Const. Art. I, §§ 1-2, 4-7. Read that way, "representative" would have the same meaning as "legislator," see *Webster's* 1291, and would exclude judges. But that relatively narrow construction also would exclude a variety of executive officials that Congress intended to reach under Section 2, such as the President, state governors, city mayors, district attorneys, and county sheriffs. Those officials are not "legislators," see U.S. Const. Art. II, but can be described as "representatives." In fact, in *Myers* v. *United States*, 272 U.S. 52, 123 (1926), this Court used that precise term to describe the President. Speaking through Chief Justice Taft, the Court explained in *Myers* that "[t]he President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide." Respondents appear to agree with that proposition. See 90-757 Br. in Opp. 8 ("Members of the legislative and executive branches are certainly representatives.").

The Fifth Circuit believed that judges, in contrast to legislative and executive branch officials, cannot be "representatives" because the two roles are utterly

incompatible. Whereas legislators are properly accountable to the wishes of the electorate, judges should stand above the views of their communities and should resolve disputes and interpret the law without attempting to satisfy discrete segments of the community. *LULAC*, 914 F.2d at 625-626 (quoting Hickok, "Judicial Selection: The Political Roots of Advice and Consent," in *Judicial Selection: Merit, Ideology, and Politics* 5 (1990)). Just so. Indeed, the Fifth Circuit was entirely correct in noting that elected judges do not represent voters in the same way legislators do. But that hardly means that elected judges can in no sense be considered representatives of the community they serve. As Judge Higginbotham aptly stated, *LULAC*, 914 F.2d at 636:

> The history of electing judges and the political impulses behind that choice are powerful evidence of considered decisions to keep judges sensitive to the concerns of the people and responsive to their changing will. This reality belies the bold assertion that judges are in no sense representatives. The assertion that judges are not representatives actually masks a concern that judges *should not* be representatives. This is a choice left to the states. * * * While judges are indeed far removed from the logrolling give and take of the legislative and even executive processes, the effort to assure "sensitivity" and "accountability" through elections is no more than an insistence that the judges represent the people in their task of deciding cases and expounding the law. State judges, wearing their common law hats, face decisions such as whether to adopt a comparative fault standard, and in doing so represent the people in a very real sense. At least at this level of generality judges are indisputably represen-

> tatives of voters. Saying so in no way steps on the equally indisputable difference between judges and other representatives—that judges do not represent a specific constituency.

The situation of an elected prosecutor is not dissimilar. Such an official is readily understood to be a "representative," even though his prosecutorial decisions should not be based on partisan political considerations, as the decisions of a legislator may be.[19]

"Representative" can refer to anyone elected to public office since the definition includes a person who "represents another as agent, deputy, substitute, or delegate usu[ally] being invested with the authority of the principal." *Webster's* 1926-1927. That definition encompasses judges because the State, and ultimately the public, delegates to judges the authority to adjudicate civil disputes and criminal charges. *Myers* demonstrates that it is not incorrect to describe an elected official other than a legislator as a "repre-

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[19] In our federal system, States are free to have their judges represent the community in a way that federal judges do not. Article III judges are given life tenure and salary protection precisely in order to insulate them from the sentiment of the community. But the States "are free to allocate the lawmaking function to whatever branch of state government they may choose." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (collecting cases). *E.g., Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612-613 (1937) (Cardozo, J.). Federal law does not restrict the functions state judges can be authorized to perform, and it is a mistake to read the term "representative" in light of the "properly limited" role of federal courts. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Congress did not intend that every Section 2 case begin with an inquiry into whether the elected officials at issue are best characterized as judicial, nonjudicial, or, if they are hybrids, as predominantly one or the other.

sentative," and there is no necessary reason why a judge also cannot be characterized in that manner. A State that elects its bench endorses the view that judges should be responsible to and should express the views of the community on the policy matters that are resolved in court, and common law judges—unlike federal judges—are frequently called upon to decide questions of policy. Also, judges "do and must legislate," if "only interstitially * * * from molar to molecular motions," in order to resolve cases when statutes or decisions do not neatly fit together. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Accordingly, a system of electing judges is certainly among those situations in which the Voting Rights Act seeks to ensure that minorities are not denied an equal opportunity to participate in the political process.

This case illustrates the point. Louisiana elects its supreme court justices from various districts within the State, and each justice can readily be said to "represent" his district on that court. In fact, a 1921 Report of the Louisiana Bar Association submitted to the Louisiana Constitutional Convention used that exact term to characterize the members of the state supreme court: "Each justice and judge now in office should be considered as a representative of the judicial district within which is situated the parish of his residence at the time of his election." GX 27. The Report's use of that term indicates that a judge can properly be characterized as a "representative" even if he is not a "legislator." What is more, Louisiana's use of a district-by-district means of filling the state supreme court indicates that Louisiana has concluded that geographic diversity helps ensure that all viewpoints are adequately represented on that court. In this setting, there is nothing

unusual in treating state judges as precisely the type of "representatives" that the Voting Rights Act of 1965 was designed to cover. See *LULAC*, 914 F.2d at 633 (Clark, C.J., concurring specially).

b. The available evidence indicates that Congress used the term "representatives" interchangeably with "elected officials" or "candidates" when discussing the scope of Section 2. Congress did not use the word "representatives" as a narrow "term of art," *LULAC*, 914 F.2d at 628, but as a broader term that included all elected officials.

Following the completion of Senate Subcommittee hearings, but before the proposed amendments were sent to the full Congress, the Senate Judiciary Committee held several executive sessions at which the language that was ultimately enacted as amended Section 2 was first introduced.[20] The discussion at the executive sessions shows that Congress did not choose the word "representatives" to limit the types of elections that Section 2 would reach, since there was no discussion of any such limitation. The text that the Subcommittee considered during its hearings would have added the term "results" to Section 2, but would not have codified the *White* v. *Regester* standard in a separate subsection (b), and therefore did not refer specifically to "representatives." H.R. 3112, 97th Cong., 1st Sess. (1981), which had passed the House, would have amended Section 2 by deleting "to deny or abridge" and adding "in a manner which results in a denial or abridgement of." See 1 Senate Hearings 57. After the Subcommittee rejected the House bill, Senator Dole offered a compromise bill that ultimately became subsection (b). Senator Dole

[20] The Executive Sessions are transcribed in the Appendix to the Hearings of the Subcommittee on the Constitution of the Senate Judiciary Committee. 2 Senate Hearings.

said that he drafted the text of that proposal to calm the fears of some opponents to the House bill that a results test would lead to proportional representation. See 2 Senate Hearings 60-62. He noted, however, that his text effectively retained the results standard of the House bill. *Id.* at 62. Thus, subsection (b) was not drafted in order to scale back the reach of subsection (a), but simply to make clear that the amended Section 2 did not require the proportional election of minority candidates. The important language in subsection (b) was not "representatives," but "of their choice" (versus "of their race").

Neither the Senate nor the House read the proposed version of amended Section 2 as limited to "legislators." The Senate Report used the terms "candidates" or "elected officials" interchangeably with the term "representatives" when discussing Section 2. *Mallory* v. *Eyrich*, 839 F.2d 275, 279-280 (6th Cir. 1988).[21] Senator Hatch, the Chairman of the Subcommittee on the Constitution of the Senate Judiciary Committee, which held hearings on the legislation, wrote a separate report on the proposed amendments to Section 2 in which he also used the term "candidates" when describing the Senate bill. Senate Report 100.[22] Sen-

[21] See Senate Report 28 ("If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect *candidates* of their choice, there is a violation of this section.") (emphasis added); *id.* at 30 ("candidates"), 31 ("candidates"), 32 ("representatives"), 67 ("candidates"). See also *id.* at 67 n.222, citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971) ("legislative candidates").

[22] Indeed, Senator Hatch's Subcommittee published its own report on the legislation, in which it criticized the results test. The Report stated that it would apply to "*all* governmental units, including * * * judicial districts." Senate Report 151. While the legislation that was before the Subcommittee did

ators Dole, Kennedy, and Mathias, the principal sponsors of amended Section 2, see 128 Cong. Rec. 14,114 (1982), consistently used the word "candidates"—not "representatives"—when discussing the proposed legislation during the floor debates.[23] Other Members of Congress also referred to "candidates," rather than "representatives," when discussing the bill.[24] No one expressed any intent to use the term "representatives" as a means of excluding judicial elections from the dilution inquiry of *White* v. *Regester*. The absence of any mention of such a limitation on the reach of the dilution test strongly suggests that none was intended. Cf. *Dillard* v. *Crenshaw County*, 831 F.2d 246, 250-251 (11th Cir. 1987) ("Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official.").

Although the Fifth Circuit believed that Congress relied on the line of cases holding that the "one person, one vote" theory is inapplicable to judicial elections, *LULAC*, 914 F.2d at 628-629, there is, in fact,

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not have the language that became subsection (b), Senator Hatch, commenting on the compromise with subsection (b) offered by Senator Dole at the executive sessions, said that "[t]he impact of the proposed compromise is not likely to be one wit different than the unamended House provision relating to section 2." 2 Senate Hearings 70 (Sen. Hatch). Clearly, neither the proponents nor opponents of the legislation intended that the word "representatives" would exclude judges.

[23] See 128 Cong. Rec. at 14,114 (Sen. Mathias); *id.* at 14,132 (Sen. Dole); *id.* at 14,140 (Sen. Kennedy); *id.* at 14,291-14,292 (Sen. Kennedy); *id.* at 14,316 (Sen. Dole).

[24] *E.g.*, *id.* at 13,127 (Sen. Hatch); *id.* at 14,133 (Sen. Thurmond); *id.* at 14,934-14,935 (Rep. Sensenbrenner). See *id.* at 13,131 (Sen. Hatch refers to "officeholders").

no evidence of such reliance. Nowhere in the legislative reports and debates did any member of Congress rely on those decisions. Instead, Congress relied explicitly on a list of 23 cases, principally from the Fifth Circuit, that had applied the vote dilution standard adopted by this Court in *White* v. *Regester* and by the Fifth Circuit in *Zimmer* v. *McKeithen*. The Senate Report noted that there is "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify. * * * These 23 cases represent the actual judicial understanding and application of the *White* standard codified in the Committee bill." Senate Report 32. See also *id.* at 23, 31, 33. An examination of those cases demonstrates that Congress did not choose the term "representative" in order to limit the reach of Section 2. The courts used the terms "representatives," "candidates," and "officeholders" interchangeably with no indication that the term "representatives" had the limited meaning that term was given in the apportionment line of cases. See also *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971) (referring to "legislative candidates").[25]

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[25] For example, the Fifth Circuit's decision in *Zimmer* v. *McKeithen*, which was prominently mentioned in the legislative history, Senate Report 23, 33, referred to "representatives" and "candidates." 485 F.2d at 1305, 1307. *United States* v. *Board of Supervisors*, 571 F.2d 951 (5th Cir. 1978), referred to "elected officials" and "candidates," and said that "the court must also be aware of the fact that supervisors' beat lines also form the election districts for individual county officeholders, such as *justice court judges* and constables." *Id.* at 956 n.9 (emphasis added). See also, *e.g.*, *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1973) ("candidates" and "public office"); *Moore* v. *LeFlore County Bd. of Election Comm'rs*, 502 F.2d 621 (5th Cir. 1974) ("public office");

Nor is there any reason to think that Congress incorporated "one person, one vote" principles as the guidepost for Section 2. Malapportionment cases address issues of "substantial equality of population," *Reynolds* v. *Sims*, 377 U.S. at 559; they do not address questions of racial discrimination or the effective cancellation of a person's vote because of that discrimination. For example, in *White* v. *Regester* this Court reversed the finding that a state reapportionment plan violated "one person, one vote" standards, but sustained a finding of racial vote dilution. Similarly, *Gaffney* v. *Cummings*, 412 U.S. 735, 751 (1973), and *City of Mobile* v. *Bolden*, 446 U.S. at 65, 78 (plurality opinion), each stated that the "one person, one vote" principle was inapplicable to a claim of racially based vote dilution. The Senate Report recognized that the concept of geographic vote dilution began with this Court's decision in the *Reynolds* case, but nevertheless concluded that racial vote dilution cases involve a materially different type of constitutional violation. Senate Report 20-21.[26]

Bradas v. *Rapides Parish Policy Jury*, 508 F.2d 1109 (5th Cir. 1975) ("elected officials"); *Wallace* v. *House*, 515 F.2d 619, 629, 631 (5th Cir. 1975) ("candidates" and "representatives"), vacated on other grounds, 425 U.S. 947 (1976); *Perry* v. *City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) ("public office"); *David* v. *Garrison*, 553 F.2d 923 (5th Cir. 1977) ("representatives" and "candidates"); *Hendrix* v. *Joseph*, 559 F.2d 1265 (5th Cir. 1977) ("candidates"); *Kirksey* v. *Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc) ("elected officials," "county officers," "representatives," and "candidates"), cert. denied, 434 U.S. 968 (1977).

[26] In fact, Senator Hatch disavowed reliance on *Reynolds*, stating that the concept of vote dilution articulated in *Reynolds* "is an entirely different concept than the one that has evolved under provisions of the Voting Rights Act. * * * The *Reynolds* and [Voting Rights Act] notions of 'vote dilution' have nothing in common but the name." 128 Cong. Rec. 13,129 (1982).

And the only circuit court decision before 1982 addressing the question whether a vote dilution claim concerning the election of judges should be analyzed under malapportionment principles rejected reliance on the "one person, one vote" line of decisions. *Voter Information Project* v. *City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980).

Finally, there is other circumstantial evidence that Congress did not exempt judicial elections from amended Section 2 by using the term "representatives." The House and Senate hearings on the 1982 Amendments contain various references to judicial elections, principally in the context of statistics indicating the progress made by minorities under the Act in such elections up to 1982.[27] In addition, 41 States elect some or all of their judges, see *The American Bench* (M. Hough 4th ed. 1987-1988), and the Members of Congress presumably are aware of the electoral practices in their own States. Under these circumstances, it is reasonable to expect that Congress would have discussed why judicial elections should be exempted from amended Section 2 if Congress intended to do so, particularly since *only* judicial elections are exempt under the Fifth Circuit's interpretation of the Act. Cf. *Sheet Metal Workers Int'l Ass'n* v. *Lynn*, 488 U.S. 347, 356 (1989). The

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[27] See, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); 1 Senate Hearings 208-209, 669, 748, 788-789, 1228, 1769, 1777, 1781.

fact that Congress did not do so, like the fact that the dog did not bark, is significant; it serves as a strong indication that Congress did not exempt such elections from Section 2.[28]

c. The Fifth Circuit in *LULAC* indicated that while the Section 2(b) results test does not apply to judicial elections, the general prohibition on racial discrimination in voting in Section 2(a) is still applicable. *LULAC* reasoned that, prior to 1982, Section 2 prohibited only discriminatory tests or devices. The two phrases that Congress inserted into Section 2(b) in 1982 from this Court's decision in *White* v. *Regester*—"opportunity to participate" and "opportunity to elect"—*LULAC* went on to say, actually described two different types of violations: The first phrase described only the pre-1982 ban on racial discrimination in voting, and the second phrase expanded Section 2 by adopting the vote dilution standard. The election of judges is exempt only from the latter provision, *LULAC* concluded, because the Act used the term "representatives" only in that regard. 914 F.2d at 624-625.

"The short answer" to that proposition "is that Congress did not write the statute that way." *Russello* v. *United States*, 464 U.S. at 23. Congress did not limit the scope of the results test to "representatives" in order to exempt judges due to the unique

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[28] See Arthur Conan Doyle, "Silver Blaze," in *The Complete Sherlock Holmes* (1927). Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.").

nature of the judicial office. The unique functions that judges perform can be taken into consideration as part of the Section 2 results test, as we have explained in our amicus brief in *Houston Lawyers Ass'n* v. *Attorney General*, No. 90-813 (consolidated with *League of United Latin American Citizens* v. *Attorney General*, No. 90-974), cert. granted (Jan. 22, 1991).[29] But Congress drafted Section 2 in a manner that allows a plaintiff to attempt to prove a violation of the Act under a vote dilution theory in the case of any elected official. Accordingly, if elected judges are "representatives," as we submit they are, then the Section 2 results test is applicable.

In addition, the Fifth Circuit's conclusion (that the language drawn from *White* v. *Regester* described two different types of violations) is incorrect. *White* v. *Regester* was a dilution case; it had nothing to do with tests or devices; and both phrases—which appear side-by-side in the Court's opinion, see 412 U.S. at 765-766—were used to describe the dilution inquiry. As Judge Higginbotham explained, "the statutory language cannot be parsed to read that judicial elections are not subject to dilution claims, but *are* subject to the remaining strictures of Section 2." *LULAC*, 914 F.2d at 643 (concurring in the judgment). The Fifth Circuit's analysis also gives the statute an odd construction, creating an artificial and litigation-provoking distinction between practices that affect "participation" and that affect "electing." Finally, the 1982 amendments did not "expand" Section 2 to cover practices that the Act did not previously reach; those amendments enacted the "results" standard while maintaining Section 2's existing coverage.

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[29] We have provided a copy of our amicus brief in *LULAC* to counsel in this case.

C. The State's Strong, Nondiscriminatory Reasons For The Structure Of Its Judicial System Are Among The "Totality Of Circumstances" That The Courts Must Consider Under Section 2

The thrust of the reasoning of the majority and concurring opinions in *LULAC* (and the contention made by respondents here) is that the courts occupy a unique position in our government, one that Congress surely was aware of and intended to protect when it amended Section 2 in 1982. That submission draws strength from the axiom that the judiciary exemplifies the principle that ours is a government of laws, not men, and the corollary that courts must impartially administer justice without concern for the political considerations that are grist for the mill in the other branches. Since courts do and should stand above politics, the argument goes, the Voting Rights Act should not be read in a manner that treats the judiciary in the same manner as the legislative and executive branches.

That argument, we believe, is a powerful one. It is certainly true that concern over the outcome of judicial elections was not the triggering event that led Congress to revise Section 2 in 1982. Instead, Congress amended the statute principally to address the problem that racial vote dilution had consistently defeated the efforts of minorities to be elected to positions like the city commission of Mobile, Alabama. It is also fair to assume that Congress was aware of the unique role that the courts play in our democratic form of government. Congress, this Court has noted, is "'predominantly a lawyer's body,' *Callanan* v. *United States*, 364 U.S. 587, 594 (1961), and it is appropriate for us 'to assume that our elected representatives . . . know the law.' *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697

(1979)." *Albernaz* v. *United States*, 450 U.S. 333, 341 (1981). That is important because it has been one of our fundamental rules of law since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that courts have a unique role in our government. The 1982 Amendments did not abandon that principle. At the same time, the conclusion to which the foregoing argument leads—*i.e.*, the election of judges is exempt from Section 2—is far broader than what the text of the Act permits or what Congress intended.

In our view, the fact that elected judges have functions different from those of elected legislative or executive officers—and that States may structure their electoral practices with those functions in mind—are legitimate factors that a court must weigh among the "totality of circumstances" when adjudicating a Section 2 challenge to judicial elections. The manner in which Section 2 applies to such elections therefore may well differ from the way that the Act applies in the case of other elected officials. In other words, the reasons set forth by the majority and concurring opinions in *LULAC* for exempting judges from the Section 2 results test are factors for courts to consider when applying that test, even though they are not persuasive reasons for exempting judges from Section 2 altogether.

Our amicus brief in the companion *LULAC* case addresses this matter in the context of the at-large election of Texas district judges. There, we argue that a State's strong, nondiscriminatory interests in having a judiciary that is representative, impartial, and perceived as such by the community, are important factors for courts to consider under the "totality of circumstances." Because those state interests are

legitimate and "strong," *Zimmer* v. *McKeithen*, 485 F.2d at 1305, if not compelling, they could spell the difference between a violation of Section 2 and a lawful electoral scheme.

This case, however, is materially different from *LULAC*. Unlike Texas district court judges, the justices of the Louisiana Supreme Court are not elected on a statewide at-large basis; they are elected from six separate judicial districts within the State, even though the Louisiana Supreme Court has statewide jurisdiction. This electoral system shows that Louisiana has made a choice that differs from the one made by Texas. Louisiana believes that its supreme court will best represent the community and best carry out its judicial function if the justices are elected from different geographic regions within the State. Whatever the validity of the interests Texas advances for its at-large electoral system, those interests are inapplicable here.

Accordingly, regardless of the outcome in *LULAC*, if this Court holds that Section 2 applies to the election of judges, a remand is necessary in this case in order to permit the court of appeals to review the district court's finding that the plaintiffs did not establish a Section 2 violation. The court of appeals has not yet addressed any of the district court's findings, and the court of appeals should be afforded the initial opportunity to do so.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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